STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
April 23, 2013

In the Matter of REECE, Minor.

No. 309870
St. Clair Circuit Court
Family Division
LC No. 11-000073-NA

Before: MARKEY, P.J., and TALBOT and DONOFRIO, JJ.

PER CURIAM.

Respondent appeals by right the trial court's order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). We affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent contends that his trial counsel was ineffective. We disagree. We review such a claim in a child protective proceeding by apply the principles of effective assistance of counsel developed in the context of the criminal law. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002).

"This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). A party claiming ineffective assistance of counsel must show that "(1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable." *Id*. at 387-388. Also, a strong presumption that the actions of counsel were reasonable trial strategy must be overcome. *Id*.

A. PRESUMPTION OF PREJUDICE

Respondent first argues that because he did not have an opportunity to speak with trial counsel until five minutes before the termination hearing, prejudice should be presumed. The United States Supreme Court has identified three rare situations in which the attorney's performance is so deficient that prejudice is presumed. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). These rare situations are (1) the complete denial of counsel at a critical stage of the proceeding, (2) where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," and (3) where "although counsel is available to assist the

accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *United States v Cronic*, 466 US 648, 659-660; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Respondent does not specify which of the three situations warranting a presumption of prejudice applies or explain why trial counsel's failure to speak with him until five minutes before the hearing warrants a presumption of prejudice.

With regard to the first situation, a critical stage is a step of the proceedings that holds "significant consequences for the accused." *Bell v Cone*, 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002). A termination of parental rights hearing clearly holds significant consequences for a parent. Thus, a termination hearing is a critical stage. Nonetheless, respondent was not completely denied the assistance of counsel at the termination hearing. Counsel was present, consulted with respondent before the hearing, cross-examined witnesses, and made a closing argument. Therefore, respondent was not completely denied the assistance of counsel at a critical stage. *Cronic*, 466 US at 659.

Moreover, the asserted lack of communication before the termination hearing was not a denial of the right to counsel. The period before the termination was not a critical stage, and counsel sent respondent letters during that period. Also, there was evidence that respondent did not respond to counsel's letters, although he attempted to do so by telephone. Thus, he may have contributed to the lack of communication.[1]

Regarding the second situation, "the attorney's failure must be complete." *Bell*, 535 US at 697. The failure is complete when the attorney fails "to oppose the prosecution through the . . . proceeding as a whole," rather than at specific points. *Id.* "For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind." *Bell*, 535 US at 697. Our Supreme Court held that where counsel's alleged failure was not complete but rather specific errors were alleged, prejudice could not be presumed, and counsel's performance should be reviewed under the *Strickland* standard.[2] *Frazier*, 478 Mich at 244-245.

Although trial counsel did not meet with respondent before the day of the termination hearing, there was not a complete failure to test the petitioner's case. *Bell*, 535 US at 697. Trial counsel consulted with respondent before the hearing, cross-examined witnesses, and made a closing argument. Trial counsel did not fail to oppose the prosecution throughout the proceeding as a whole; therefore, trial counsel did not entirely fail to subject petitioner's case to meaningful adversarial testing. *Id.*

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[1] We note that at the evidentiary hearing, respondent argued that counsel's failure to appear at the January 23, 2012, permanency planning hearing constituted a denial of the right to counsel. Although respondent requested counsel for that hearing, and trial counsel admitted he was not present, respondent does not make this argument on appeal.

[2] See *Strickland v Washington*, 466 US 668, 687-688, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This is the standard stated in *Brown*, 294 Mich App at 387-388.

With regard to the third situation, the circumstances must be such that even competent counsel could not function properly. *Cronic*, 466 US at 659, n 26. But respondent fails to allege, and there do not appear to be, any surrounding circumstances of that magnitude. Rather, respondent focuses on counsel's performance. Therefore, the circumstances were not such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *Id.*

Because none of the three situations warranting a presumption of prejudice applies, respondent's claim must be analyzed under the *Strickland* standard. *Frazier*, 478 Mich at 243.

B. PERFORMANCE AND PREJUDICE

Respondent alternatively argues that trial counsel's performance fell below an objective standard of reasonableness and that he was prejudiced. Respondent alleges counsel made the following prejudicial errors: (1) he sent respondent a letter asking for witnesses and exhibits, rather than meeting with respondent to determine what witnesses to call and exhibits to admit; (2)he failed to meet with respondent until just before the hearing; (3)he called respondent as a witness without adequate preparation; (4) he did not object to hearsay at the hearing; (5) he did not call his friend and neighbor, Jesse Duncan, as a witness; (6) he did not seek to admit respondent's medical records; (7)he did not admit the transcript of the probation violation hearing; and (8) he did not obtain and review the Department of Human Services' (DHS) file.

Respondent argues that trial counsel's conduct regarding alleged errors (1), (2), (5), (6), and (7), fell below an objective standard of reasonableness. Respondent cites the American Bar Association (ABA) Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases which indicate that sending a letter regarding witnesses and exhibits and failing to meet before the hearing are improper. The Supreme Court has held that ABA standards are only guides as to reasonable conduct of counsel. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel testified that it was his practice to send such a letter, but respondent never replied. Respondent testified that he did not write letters, but he did attempt to call counsel. Respondent asserted that he did not know which witnesses or exhibits were important. Although counsel did not meet with respondent to discuss any witnesses or exhibits, his strategy was to argue that respondent should be given more time to complete services. Counsel also testified that respondent did not identify any witnesses or exhibits when they met before the termination hearing, but if he had, counsel would have requested an adjournment. We conclude that counsel's conduct did not fall below an objective standard of reasonableness and that respondent has not overcome the presumption that counsel employed a reasonable trial strategy. *Brown*, 294 Mich App at 388. An appellate court must not second-guess counsel on matters of trial strategy. *Strickland*, 466 US at 689.

Additionally, respondent has failed to show prejudice. Respondent argues that trial counsel should have called Duncan as a witness and should have admitted his medical records and the transcript of the probation violation hearing. However, it is not reasonably probable that the failure to call Duncan as a witness, or admit respondent's medical records and the transcript of the probation violation hearing affected the outcome of the termination hearing. Respondent contends that Duncan would have testified that respondent was a good father based on his observations while living in the apartment above respondent during the four month period that

respondent had custody of the child. But there was testimony at the termination hearing from both respondent's mother and the foster care worker that suggested respondent was a good father when he was present. Consequently, it is not reasonably probable that not having Duncan testify affected the outcome. Duncan's testimony would also not have overcome the evidence that respondent failed to obtain housing and employment and was facing incarceration for an indefinite period of time. Regarding the medical records, respondent testified that he did not test positive for drugs and that the reason he left the Huron House was to obtain his medical records that would have shown that he did not test positive for illegal substances. However, even if it were established that respondent did not test positive for drugs, he still left the Huron House without permission, resulting in his probation violation and incarceration. So even were it true that he went to obtain such evidence, the information would not have changed the outcome of the termination hearing. Similarly, there is no indication that the transcript of the probation violation hearing would have affected the outcome of the termination hearing.

With regard to alleged error (3), respondent again cites an ABA standard indicating that counsel should thoroughly prepare a client before calling the client as a witness. See Standard 29. Counsel testified that for 20 to 30 minutes before the hearing, he went over the subject matter with respondent, including the questions he would ask. Even so, respondent has not alleged any actual prejudice that resulted from his testifying with allegedly inadequate preparation. Respondent does not allege any statements that he made or did not make that affected the outcome of the termination hearing.

Respondent also argues that impermissible hearsay was permitted at his trial. Because the court acquired jurisdiction over the minor child based on the mother's plea, petitioner was required to use legally admissible evidence in order to terminate respondent's parental rights. *In re CR*, 250 Mich App at 205-206. Indeed, there were numerous instances during the hearing where hearsay was allowed into evidence and to which counsel failed to object. Many of them pertained to the child's mother. This cannot be considered sound trial strategy. Nonetheless, respondent has again failed to allege any prejudice. He claims that the foster care worker's testimony regarding respondent's failure to complete or benefit from services was based on hearsay, but he does not identify any specific hearsay statements that affected the outcome of the termination hearing. Moreover, the foster care worker's testimony that respondent failed to provide employment verification or obtain housing appear based on her personal knowledge.

With regard to alleged error (8), respondent again relies on an ABA standard indicating that counsel must obtain and review the DHS file. See Standard 21. Trial counsel admitted that he did not obtain or review the DHS file before the termination hearing. However, he testified that he reviewed the orders, which summarized what occurred at the review hearings, as well as the petitions. Thus, his conduct did not fall below an objective standard of reasonableness and appeared to be sound trial strategy. See *Brown*, 294 Mich App at 387-388. Moreover, respondent has failed to allege any prejudice resulting from trial counsel's failure to obtain and review the DHS file. Respondent does not argue what trial counsel could have done differently at the termination hearing if he had reviewed the file.

II. PLACEMENT WITH RELATIVES

Respondent argues that reversal is required because the trial court failed to explicitly address whether termination was appropriate in light of the child's possible placement with relatives, which renders the record inadequate to review the court's best interest determination.[3] We disagree.

In *In re Olive/Metts*, 297 Mich App 35, 43; 823 NW2d 144 (2012), this Court stated:

> [B]ecause "a child's placement with relatives weighs against termination under MCL 712A.19a(6)(a)," the fact that a child is living with relatives when the case proceeds to termination is a factor to be considered in determining whether termination is in the child's best interests. Although the trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests, the fact that the children are in the care of a relative at the time of the termination hearing is an "explicit factor to consider in determining whether termination was in the children's best interests." A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal. [Citations omitted.]

Although the trial court's order terminating respondent's parental rights did not explicitly address the minor child's placement with his paternal grandmother, the order specifically referenced the referee's findings of fact and conclusion of law. The referee's findings of fact and conclusions of law mentioned the minor child's placement with his paternal grandmother, although not in the context of the best interest analysis. The trial court's reference to the referee's findings of fact and conclusions of law indicates that the trial court was aware of the minor child's placement with a relative and considered that fact when making its best interest determination. The trial court was permitted to terminate respondent's parental rights if it found termination was in the minor child's best interest. *Id.*

We affirm.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Pat M. Donofrio

[3] Although respondent also suggests that the trial court failed to address each child individually, there was only one child at issue.